Lancaster Care Center, L.L.C. *and* Sheet Metal Workers International Association, Local Union #565, AFL–CIO. Case 30–RC–6193

November 22, 2002

DECISION AND DIRECTION OF FOURTH ELECTION

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has considered objections to an election held April 26, 2001, and the hearing officer's report recommending disposition of them.

The election was conducted pursuant to an Order Setting Aside Election and Direction of Third Election. The tally of ballots shows 20 for and 21 against the Petitioner, with 2 challenged ballots, which were sufficient in number to affect the results of the election.[1]

The Board has reviewed the record in light of the exceptions and briefs,[2] has adopted the hearing officer's findings[3] and recommendations, as modified below, and finds that the election must be set aside and a new election held.

The Employer has excepted to the hearing officer's recommendations to sustain the Petitioner's Objections C, D, G, H, and I. We agree with the hearing officer's recommendation to sustain Objection D and find that it warrants setting aside the election.[4] Thus, the credited testimony of Cindy Klinkhammer was that she overheard LPN Kris Mumm, a supervisor,[5] tell another CNA that if the Union were successful in organizing the certified nursing assistants (CNA's) the LPNs would no longer help the CNAs. The credited testimony also shows that this statement was disseminated by Klinkhammer to other unit members. Finally, it is significant that the threat of reprisal was made within 2 months of the election and that it could have affected the election, which was decided by one vote. It is well established that a threat of reprisal reasonably tends to interfere with the employees' free and uncoerced choice in an election. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969); *Hopkins Nursing Care Center*, 309 NLRB 958 (1992); and *Copps Food Center*, 296 NLRB 395 (1989). Therefore, the Employer's exceptions as to this objection are without merit.

In dissent, Member Cowen argues that Mumm's statement[6] was "an almost certainly truthful statement concerning what the Union would do at Lancaster to protect the work jurisdiction of the CNAs": to advance the interests of CNAs, the Union would prevent LPNs from helping CNAs. Thus, in his view, the statement was neither a threat of reprisal (because it did not implicate action by the employer), nor a prediction of adverse consequences if the Union prevailed in the election (because protecting work jurisdiction would be advantageous, not harmful, to the CNAs). The Employer, however, who would reasonably best construe its own witness's testimony, does not even advance this interpretation of what was said.

In any case, the flaw in the dissent's view is that Mumm did not say anything resembling what Member Cowen says. Whether or not her statement may have been prompted by her knowledge of events at another facility where the CNAs had organized, Mumm did not link her prediction, as Member Cowen does, to the anticipated efforts of the CNAs' union. Nor did Mumm suggest, in any way, that the CNAs might prefer *not* to have the LPNs help. Regardless of our colleague's interpretation of what she may have intended to say, we must evaluate Mumm's actual statement, as it is the sole evidence on this record of her intended meaning.

Here, the most straightforward interpretation of what Mumm did say is that she threatened the CNAs with reprisal or predicted adverse consequences from unionization. This interpretation is bolstered by Mumm's testimony that she told employees that the change was based on "Orchard Manor policy," with no reference to either negotiations or union preference at that facility. Contrary to our dissenting colleague's reasoning, the stan-

[1] In the Board's earlier Order and Direction of Hearing on the objections, the Board adopted, pro forma, the Regional Director's recommendations that the challenge to employee Mezera's ballot be sustained and that employee Meyer's ballot remain unopened because it was no longer determinative.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule the Petitioner's Objections A, B, and J.

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361, (1957). We find no basis for reversing the findings.

[4] Because Objection D warrants setting aside the election, we find no need to pass on the other objections sustained by the hearing officer. While she agrees that Objection D provides sufficient grounds to set aside the election, Member Liebman would also agree with the hearing officer that the surveillance incidents in Objections G and H constituted objectionable conduct.

[5] During the hearing, the parties stipulated that Mumm was a statutory supervisor within the meaning of the Act.

[6] Member Cowen bases his view on the evidence that Supervisor Mumm said, "[I]f the Union were successful, the LPNs would no longer help the CNAs." This is the phrasing used by employee Klinkhammer. Mumm testified that she told employees, "[A]ccording to the Orchard Manor policy, since they have had the union, the LPNs are not required to go out on the floor to assist the aides as they have before they were unionized."

dard for evaluating what Mumm did say is not whether it *could*, given sufficient additional information, be interpreted benignly by a reasonable employee. Rather, the "test, an objective one, is whether the conduct of a party to an election has the tendency to interfere with the employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

Our colleague claims that he agrees with us as to the appropriate test, but that our point of departure is our different visions of a "reasonable employee." Thus, he says:

> Implicit in my evaluation of Mumm's remark is the view that a reasonable employee in the midst of a union organizing campaign is open-minded and seeks to be accurately informed about matters germane to her impending election choice, including work jurisdiction protection . . . . By contrast, the "reasonable employee" posited by the majority strikes me as reflexively suspicious of her employer and therefore prone to jump to conclusions instead of finding out why Orchard Manor's LPNs no longer help its CNAs, and why the same thing would likely happen at Lancaster if its CNAs voted or the union . . . .

The dissent errs in two respects: First, the standard for judging whether statements "imparted somewhat cryptically" (the dissent's words) are objectionable does not entail an obligation on the part of the "reasonable employee" to inquire into "the facts of life in a unionized workplace" in order to divine a legitimate gloss to what was said. The test is not what the speaker may have meant to say, but did not. Rather it is whether the actual words spoken would tend to interfere with employee free choice. The Court has declared that this resort to "brinkmanship" is to be shunned. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Second, in *Gissel*, 395 U.S. at 618, the Supreme Court provided the vision of the "reasonable employee" that guides our analysis. It is necessary, the Court said, when analyzing employer statements that could be interpreted as threats, to "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." Id. at 620.

Thus, a reasonable employee, hearing Mumm's statement and knowing that the LPNs were subject to the Employer's direction, could infer that the LPNs' refusal to help the CNAs would be attributable to the Employer's direction or at least its acquiescence. The statement is therefore appropriately viewed as a threat of adverse consequences should the employees choose to unionize. The possibility that some employees might have interpreted the statement as Member Cowen has, and the purely speculative possibility that the Union would have offered other employees the same benign explanation of Mumm's statement that our colleague advances if an employee had approached the Union for clarification, in no way diminishes the likely effect of the statement.

In short, there is no way to reconcile our dissenting colleague's position with the Board's well-established standard for assessing objectionable conduct. Because a statement need only have a reasonable tendency to interfere with employees' freedom of choice,[7] the possibility of a benign interpretation—even a possibility less remote than the one offered by the dissent—is immaterial.

[Direction of Fourth Election omitted from publication.]

MEMBER COWEN, dissenting.

The hearing officer recommended sustaining Objections C, D, G, H, and I. My colleagues sustain Objection D, find it unnecessary to pass on the others, set aside the results of the third election, and direct a fourth election. I would overrule all of the Petitioner's objections and certify the results of the election.

Objection D is based on a statement made by LPN Kris Mumm, a supervisor at Lancaster Care Center, sometime in March or April 2001. According to CNA Klinkhammer, Mumm said that if the Union were successful, the LPNs would no longer help the CNAs (certified nursing assistants). Mumm testified that she said, "[A]ccording to the Orchard Manor policy, since they have had the union, the LPNs are not required to go out on the floor to assist the aides as they have before they were unionized." Orchard Manor, like Lancaster Care Center, is a long-term resident care facility. The hearing officer partly discredited Mumm's testimony, finding that Mumm "did not carefully convey to the CNAs that she was only referring to another facility and not what would happen at Lancaster." However, the hearing officer did not discredit Mumm entirely: she did not find that Mumm made *no* reference to what had happened at Orchard Manor, but merely that her statement was not limited *solely* to Orchard Manor but also communicated what Mumm believed would happen at Lancaster if the CNAs unionized.

[7] We do not disagree with our colleague's observation that the fact that statements may sway a reasonable employee to reject the union have no bearing on assessing the statement's lawfulness. However, that is not the question before us. Instead, the issue here is whether statements interfere with the employees' capacity to exercise their freedom of choice.

In sustaining Objection D, my colleagues find that Mumm's statement was a threat of reprisal. I disagree. Mumm's remark, which was based on what had happened at another resident care facility after its CNAs had unionized, amounted to nothing more than an almost certainly truthful statement concerning what the Union would do at Lancaster to protect the work jurisdiction of the CNAs. Such a statement is not a threat of reprisal, but rather an unobjectionable explanation of one of the natural consequences of choosing union representation. See, e.g., *Tri-Cast, Inc.*, 274 NLRB 377 (1985); *John W. Galbreath & Co.*, 288 NLRB 876 (1988). Thus, objectively considered, the tendency of Mumm's statement was not to interfere with employees' freedom of choice, but rather to inform that choice. Indeed, the information conveyed by Mumm would have tended to favor the Union, since work jurisdiction protection is generally deemed an advantage of unionization. However, even if Mumm's remark would sway a reasonable employee to reject the Union, that fact would have no bearing on the statement's lawfulness. An employer's truthful statements about the facts of life in a unionized workplace are lawful regardless of their effect on employees' union views. For example, an employer may lawfully tell its employees that its freedom to deal directly with them would be constrained were they to choose union representation, even though such a statement would tend to discourage union support among employees who prefer to deal with their employer on an individual basis.

My colleagues contend that I have failed to apply the proper test in evaluating Mumm's remark, and that a reasonable employee would likely attribute the predicted loss of LPN help to the Employer. In my view, however, the disagreement between myself and the majority does not concern what test to apply—we both follow the objective test set forth, for example, in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995)—but rather centers on a difference of opinion concerning what a "reasonable employee" constitutes. Implicit in my evaluation of Mumm's remark is the view that a reasonable employee in the midst of a union organizing campaign is open-minded and seeks to be accurately informed about matters germane to her impending election choice, including work jurisdiction protection—even where, as here, the information is imparted somewhat cryptically. By contrast, the "reasonable employee" posited by the majority strikes me as reflexively suspicious of her employer and therefore prone to jump to conclusions instead of finding out why Orchard Manor's LPNs no longer help its CNAs, and why the same thing would likely happen at Lancaster if its CNAs voted for the Union—not as an act of retribution by the Employer, but as a natural consequence of unionization. Such an employee conceivably could construe Mumm's remark as a threat of reprisal. In my view, however, such an employee would not constitute a reasonable employee.

Accordingly, I would overrule Objection D. I would also overrule Objections C, G, H, and I for the reasons set forth below.

Objection C: The conduct that the Union alleged as objectionable in Objection C differs from that found by the hearing officer to have been so. In her report, the hearing officer characterizes Objection C as alleging that the Employer "made a unilateral change to its attendance policy." In its Objections to Conduct Affecting the Results of the Election of April 26, 2001 (the instant objections), however, the Union did not allege that the attendance policy change itself was objectionable. Instead, it alleged that the Employer "*posted* changes in its attendance policy," and that the effect of doing so "was *to communicate* a unilateral change in [its] attendance policy in direct contradiction to the settlement terms" (emphasis added). The settlement terms just referred to concern the parties' settlement of the Union's objections to conduct affecting the results of the second election. As part of that settlement, the Employer posted a notice. The instant objections recite certain provisions of that notice, as follows:

> *WE WILL NOT* do anything which interferes with, restrains, or coerces you with respect to [your Section 7] rights. More specifically,
>
> *WE WILL NOT* communicate to employees that there would be unfavorable changes in their working conditions if [the Union] wins the election.
>
> *WE WILL NOT* communicate to employees, by any means, either directly or by implication, that it would be futile for employees to seek to improve their wages, hours or conditions of employment, by voting in favor of the Union.

These promises not to communicate certain messages to employees are apparently the settlement terms the Union believes were contravened when Lancaster posted, and thus communicated, a change in its attendance policy.

I need not determine whether the hearing officer exceeded her authority by considering an issue not alleged by the Union in its objections, see, e.g., *Precision Products Group*, 319 NLRB 640 (1995), because whether Objection C concerns the making of the attendance policy change or merely its posting, either way the Employer's conduct was unobjectionable.

A few facts by way of background. The Employer, Lancaster Care Center, is one of several long-term care facilities owned and operated by Rice Enterprises (Rice). Lancaster does not have its own separate attendance policy. Rather, Rice sets the attendance rules for employees at all of its facilities. The administrative director of Rice is Karen Clapp; the head administrator at Lancaster is Phyllis Duncan.

In March 2001, Duncan received a memo from Clapp concerning Rice's "leave early" policy. The memo stated that employees would be counted as absent on any day they leave work before completing one-half of their shift. Prior to the memo, Rice's attendance policy had stated only that "leave earlies" would be documented. Clapp's memo was prompted by employees at another Rice facility, not at Lancaster, who were coming to work for an hour and then leaving. Duncan posted Clapp's memo. However, she removed it several days later at the instruction of counsel for Rice, who had received a letter from the Union complaining about the memo.

Taking the hearing officer's construction of Objection C first—that Lancaster engaged in objectionable conduct by changing its attendance policy—the objection fails on two counts. First, Lancaster did not change its attendance policy. Rice changed the attendance policy for all of its facilities, and told Lancaster to implement the change. Second, regardless of who was responsible for the changed "leave early" rule, the change itself was not objectionable. It was made for a legitimate business reason—to close a loophole in Rice's attendance policy that some employees had been exploiting—and it was implemented uniformly at all Rice facilities without regard to union considerations. See *Troxel Co.*, 301 NLRB 270, 280–281 (1991), enfd. 945 F.2d 405 (6th Cir. 1991). Furthermore, for obvious reasons, objectionable workplace changes during union campaigns typically consist of grants of benefits. I do not see how changing an attendance policy to make it *stricter*, as was done here, could reasonably tend to coerce employees to vote against the Union.

The hearing officer also found Lancaster's conduct objectionable in part because Duncan removed the posted "leave early" memo "when faced with employee concerns within the critical period." The record demonstrates, however, that Duncan removed the posting, not because of "employee concerns," but because Rice's attorney told her to do so after receiving the Union's letter complaining about it. In essence, the hearing officer found objectionable the Employer's efforts to cooperate with the Union. I reject that finding.

Taking Objection C as it was originally alleged by the Union—that the posting of the new rule on "leave earlies" communicated a unilateral change in attendance policy in contravention of the terms of an earlier settlement—the objection is equally baseless. Under the terms of the referenced settlement, Lancaster promised not to communicate to employees that it would make adverse changes in working conditions if the Union were to win the election. It also promised not to communicate to employees that it would be futile to vote for the Union. The posted change to the attendance policy communicated neither of these messages.

Accordingly, I would overrule Objection C.

Objections G and H: In connection with Objections G and H, the Petitioner introduced evidence of six instances of alleged surveillance of employees in order to monitor union activity. The hearing officer found objectionable conduct in two out of the six.

The first of these two incidents involved CNAs Sheila Schluenz and Joanna Johll, both active union supporters. Lancaster's maintenance supervisor, Jerrod Mezera, saw Schluenz and Johll sitting in the special care unit TV room talking with off-duty employee Celine Schmitz. Neither Schluenz nor Johll was on break. Schmitz and Johll both admitted on cross-examination that employees are expected to work when they are not on break. Schmitz further testified that there is too much work to do for employees to be sitting around. Mezera informed Duncan that an off-duty employee was visiting with two on-duty employees in the TV room. Duncan asked Mary Kalloway, an RN, to check out the situation. According to the credited testimony, Kalloway beckoned Schmitz out of the TV room and told her: "I think you'd better leave. Phyllis [Duncan] is watching those two girls back there"—i.e., Schluenz and Johll. The second incident may be more briefly related and involved Schluenz alone. According to Schluenz, one day during the critical period Duncan stood next to her without saying anything in three different areas of the Lancaster facility.

Two more facts, or rather sets of facts, are material to determining whether either of the foregoing incidents constituted objectionable conduct. First, one day during the critical period, Duncan told RN Theresa Kopp that there were CNAs not working. Kopp went to the Special Care Unit and saw Schluenz and Johll sitting and not working. Kopp told them they needed to find something to do. Second, the time period immediately preceding the third election happened to coincide with Lancaster's annual investigation by the State of Wisconsin. The purpose of the yearly survey is to ensure that Lancaster is complying with State and Federal regulations. After the State survey team carries out its investigation, Lancaster is issued a Statement of Deficiencies, in response to which it formulates a Plan of Correction. After an inter-

val for implementation, the survey team returns unannounced to see whether the Plan of Correction has been put into practice. Lancaster's 2001 investigation was carried out the week of February 19–23. At a mandatory meeting on February 28, 2001, employees were informed that department heads would be making rounds to ensure implementation of the Plan of Correction.

Taking all of the foregoing into consideration, I do not find that the Employer was spying on Schluenz and Johll in order to monitor their union activities. In finding to the contrary, the hearing officer particularly relied on Kalloway's statement that Duncan was "watching" Schluenz and Johll. However, the mere fact that Duncan was keeping an eye on Schluenz and Johll does not support a finding of objectionable conduct because employers are entitled to observe the activities of their employees in the workplace during working time. See *Crowley, Milner & Co.*, 216 NLRB 443, 444 (1975). Furthermore, after the February 28 employee meeting, Lancaster's employees reasonably would have expected to be watched more closely than usual in anticipation of the state's unannounced followup inspection. Also, on both occasions when Duncan asked someone to check on Schluenz and Johll, they were found sitting down on the job. It seems to me more likely that Duncan was watching Schluenz and Johll for legitimate supervisory reasons than to spy on their union activity. Finally, Duncan's mere act of standing near Schluenz while not saying anything cannot, without more, be reasonably viewed as surveillance. Thus, I would overrule Objections G and H.

Objection I: Objection I concerns remarks made by Duncan in a speech to employees. The Union had accused Duncan of spying on Schluenz, and Duncan decided to challenge that accusation openly. On April 11, 2001, she delivered the following speech at two employee meetings:

> I apologize for calling you here today. I know you guys are tired of hearing about union issues. I didn't intend to call this meeting, but the most recent personal attacks on me by the union has [sic] forced me to talk to you today. You cannot believe the union. They have accused me of engaging in surveillance of Sheila Schluenz. I really feel that I need to respond to this accusation. The union's attorney said Sheila reported to them that I was shadowing her on a constant basis. They claim I am harassing her[.] Each of you has seen me walking throughout the facility[;] you know that's my responsibility. I care about these residents and I care about you. I have dedicated 27 years to this facility. You know, I have never and will never engage in the activity they have accused me of. I am really hurt, as I am sure each of you would be, with these unfounded personal attacks. And, I ask, do you really want to be represented by a group of outsiders who stoop to false accusations to influence your vote? What else are they lying about? I just want to say . . . . Thanks again for coming. I appreciate this opportunity to share the truth with you.

(Ellipsis in original.) The hearing officer found this speech objectionable because it "would reasonably cause employees to question things told to them by Schluenz and the Union," and because it would cause employees to "think twice before engaging in union activities" and to "hesitate reporting to the Union what happened at the facility."

Duncan's speech was not objectionable. The Employer has a right, protected under Section 8(c) of the Act, to make statements that would "cause employees to question things told to them" by the Union and its supporters. Indeed, a central purpose of Section 8(c) is to protect employers' right to do precisely what Duncan did: oppose a union organizational campaign vigorously and strenuously. See *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1224 fn. 7 (2002). Employers lose that right, of course, when they make statements containing either a threat of reprisal or a promise of benefits. By stating that employees would "think twice before engaging in union activities" and "hesitate reporting to the Union what happened at the facility," the hearing officer appears to suggest that Duncan's speech contained a threat of reprisal. It did not. Thus, I would overrule Objection I.